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October 11, 2007

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***In re Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; Petitions of AT&T, BellSouth, Embarq, Citizens, Frontier and Qwest for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services, WC Docket Nos. 06-125, 06-147**

Dear Secretary Dortch:

XO Communications, LLC ("XO") submits this letter in response to the assertions by certain ILEC commenters that special access rates must be just and reasonable because no section 208 complaints have been filed recently. Such assertions are inane, especially in light of the fact that special access rates have now been under review by the Commission in the above-captioned rulemaking proceeding and the AT&T-initiated docket that led to it for *five years*.

The records in the above-captioned proceedings make plain that the problem of excessive special access is neither isolated nor carrier specific. As a systemic, industry-wide problem encompassing numerous products, carriers and purchasers, the special access problem is not a problem well-suited to resolution via the Commission's section 208 complaint process. This *ex parte* addresses why concerns regarding special access rates, terms and conditions imposed by the Bells and other price cap LECs should be addressed in this rulemaking proceeding rather than through the Commission's section 208 complaint process.

I. The Special Access Problem Is Industry-Wide and Systemic – the Rules Need to Be Changed

As XO detailed in its Comments[1] and Reply Comments[2], the current problem associated with the pricing of special access services offered by the Bells and other price cap LECs is in no small part the result of price cap and price flex rules and policy decisions that have allowed these carriers to charge rates that are unjust and unreasonable. The Commission's special access pricing regime was based on a level of competition that was predicted to occur but which, in fact, never materialized. Consequently, special access rates have been allowed to rise to excessively high levels, with some special access providers realizing rates of return of 100% or more on these services.[3] In addition, many of the price cap LECs' discount plan offerings contain onerous and exclusionary terms and conditions.

These problems are not confined to one or two entities or to a limited number of products which would lend itself to resolution by the Commission's complaint process. Instead, excessive rates and anti-competitive terms and conditions are found in the special access offerings of most, if not all, of the price cap LECs, and affect all entities that rely upon those service offerings, including carriers and enterprise customers. The result is an industry-wide and systemic market failure in the market for special access services. A problem that is not carrier-specific or even service-specific – and that is in no small part attributable to rules that need reform – is best addressed in a rulemaking of general applicability rather than a party-specific complaint proceeding. Based on the systemic nature of the problem and the number of entities involved, the above-captioned special access rulemaking proceeding is the appropriate forum in which to resolve these issues. Any decision resulting from the such rulemaking will have general applicability and the Commission will be able to avoid the costs and regulatory uncertainty that surely would result from having the issues addressed on a case-by-case basis utilizing the Commission's formal complaint process.

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1 *See Comments of XO Communications, LLC, Covad Communications Group, Inc. and NuVox Communications*, WC Docket No. 05-25 (filed August 8, 2007) ("Initial Comments").

2 *See Reply Comments of XO Communications, LLC, Covad Communications Group, Inc. and NuVox Communications*, WC Docket No. 05-25 (filed August 15, 2007) ("Reply Comments").

3 *See* Initial Comments at 2, 4-5.

II. The Commission's Formal Complaint Process Does Not Provide an Efficient and Timely Means for Resolving Special Access Rate Disputes

The Commission's formal complaint process, while valuable for resolving discrete disputes involving two parties, is not the appropriate means by which to resolve systemic issues involving numerous parties. The current formal complaint process suffers from several flaws which render it unsuitable for resolving current special access rate issues. Indeed, the Commission previously acknowledged the shortcomings of the complaint process as a means of addressing special access rate concerns. In the *Triennial Review Remand Order* the Commission stated that it:

> d[id] not believe that the Act's general provisions designed to guard against anticompetitive behavior are sufficient to protect competitive carries from potential abuses of special access pricing on a timely basis.[4]

First, the process is time consuming and does not always result in timely dispute resolution. Although section 208 mandates that complaints concerning the lawfulness of a tariffed rate or practice or those questioning the lawfulness of a rate or practice that would have been tariffed but for the Commission granting forbearance from a tariffing requirement[5] are subject to the five month decision deadline, the Commission does not always adhere to this deadline.[6]

Second, the complaint process offers only limited remedies – none of which can change the rules that are now contributing to the current special access market failure. Moreover, once a tariff is filed and becomes effective without being suspended it receives "deemed lawful" status and the carrier generally is not liable for issuing refunds, even if the tariff is later determined to be unlawful.[7] Consequently, a customer that utilizes the Commission's complaint process to contest a carrier's tariffed rates would not likely be able to receive a refund of any amounts paid even if the tariff is later determined to be unlawful and instead likely would

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4 *In re Unbundled Access to Network Elements*, 20 FCC Rcd 2533, ¶ 62 (2005).

5 47 U.S.C. § 208(b)(1).; *see In re: Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, 16 FCC Rcd 6417, ¶ 156 (1999).

6 *See, e.g., AudioText International, Ltd. v. AT&T Corp.*, 19 FCC Rcd 3429 (2004) (Complaint filed May 13, 2003 and Order issued Feb. 13, 2004).

7 *See, e.g., ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403 (D.C. Cir. 2002); *AT&T Corp. and AT&T of the Virgin Islands, Inc. v. Virgin Islands Tel. Corp., d/b/a Innovative Telephone*, Separate Statement of Commissioner Kevin J. Martin, 19 FCC Rcd 15978 (2004).

receive only prospective relief. The threat of *prospective* penalties – *if* a customer is able to endure the time consuming and costly complaint process and *if* the customer eventually prevails in that process – is not sufficient to curb the anti-competitive behavior of certain price cap LECs.

Third, the formal complaint process requires a substantial investment of time and resources by both the Commission and the parties to the complaint. Unlike the "notice pleading" that applies to lawsuits filed in federal court, the Commission requires complainants to prepare virtually an entire case before filing. Under the Commission's rules, a complainant is required to file at the front-end of the process, in addition to a detailed complaint,[8] proposed findings of fact, conclusions of law and a legal analysis,[9] an information designation identifying individuals with knowledge relevant to the complaint and a description of all documents in the complainant's control,[10] copies of all documents in the complainant's control or possession which relate to the complaint and all discovery requests.[11] Requiring these tasks to be done before hearing the respondent's position, or having the benefit of discovery, as is the normal course in federal district court, often requires complainants to effectively prepare their cases twice or more, driving the cost of such litigation into the stratosphere.

Finally, because the special access problem is not limited to one or two special access service providers or services there is an undeniable need for a decision that will apply uniformly to all carriers. Resolving the special access rate issues as part of the above-captioned special access rulemaking proceeding will ensure that there will be single Commission decision, based on a single record, which will provide clarity and certainty of the Commission's position on special access rates. In contrast, resolving special access rate issues via the Commission's formal complaint process will result in separate decisions based on the facts of each individual complaint proceeding. While the decisions in these complaint proceedings should have a precedential affect on other, similar complaint proceedings, there are no guarantees until the next case is litigated and the Commission reaches the same result again.

III. The Commission's Accelerated Docket Process Is Not a Viable Option for Resolving Special Access Rate Disputes

The Commission's accelerated docket process is also not appropriate for resolving the pervasive special access market failure the Commission presently is attempting to address in its rulemaking proceeding. Although the process permits faster resolution – 90 days instead of 5

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8 47 C.F.R. § 1.721(1)-(5).

9 *Id.* § 1.721(6).

10 *Id.* § 1.721(10).

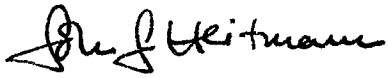
11 *Id.* § 1.721(11).

months[12] – there is no guarantee that any particular complaint will be accepted into the process or how long it will take to be accepted into the accelerated docket. The rules governing the process grant the Commission substantial discretion in deciding which complaints to include in the accelerated docket[13] and consequently, it is possible that the Commission would decline to resolve any particular special access rate dispute. Further, most, if not all, accelerated docket proceedings result in Enforcement Bureau decisions issued upon delegated authority.[14] Any such delegated authority decisions issued against a special access provider would be subject to review by the full Commission,[15] further increasing the time to a final resolution of the issues.

Conclusion

As discussed in detail above, the Commission's special access rulemaking proceeding, and not the formal complaint process, is the appropriate forum for resolving current issues regarding excessive special access rates and anti-competitive practices. Any questions regarding this letter or any of the arguments discussed herein should be directed to the attention of the undersigned.

Respectfully submitted,



John J. Heitmann

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12 *Id.* § 1.730 *passim.*

13 *Id.* § 1.730(e).

14 *Id.* § 1.730(h).

15 *Id.* § 1.730(h).